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Supreme Court of the United States

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, Executors of the Estate of Seth M. Milliken, Deceased,
Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the Court of Claims.

BRIEF OF EDWARD H. BLANC AND RUSSELL L. BRADFORD, AS *AMICI CURIAE,* AND ON BEHALF OF THE CITY BANK FARMERS TRUST COMPANY, AND OTHERS.

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae,
43 Exchange Place,
New York City, New York.

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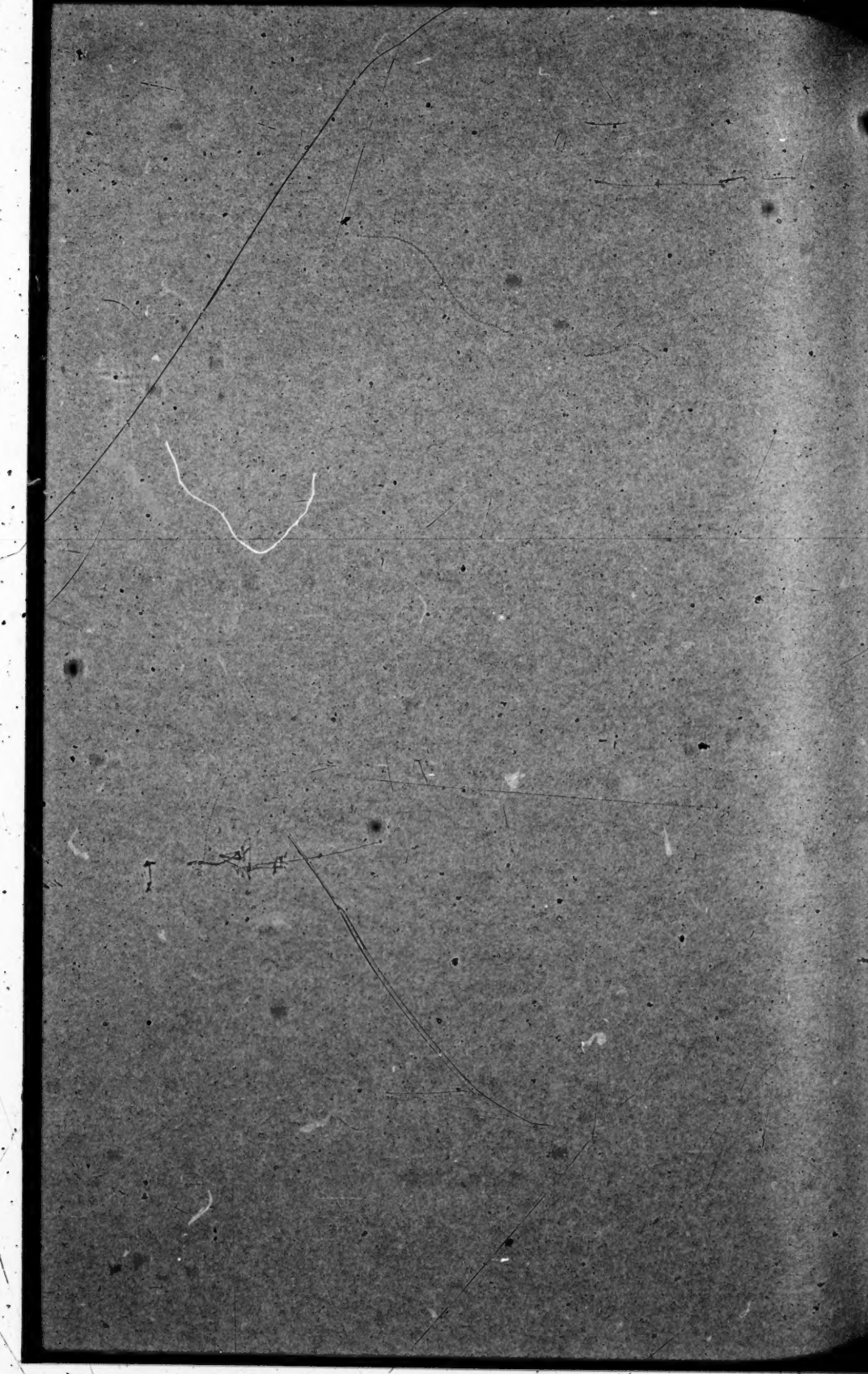

SUBJECT INDEX.

	PAGE
MOTION FOR LEAVE TO FILE BRIEF	1
REFERENCE TO FACTS	2
BRIEF RESUMÉ OF FACTS IN CASES REPRESENTED BY AMICI CURIAE	2
STATEMENT OF THE ISSUES	3
POINT I. May a transfer made during the pendency of the tax law with stated graduated rates of tax be subject to an excise tax under a subsequently enacted law at greatly increased graduated rates of tax?	3
POINT II. May an irrevocable transfer made in contemplation of death (whether made before or after the passage of this act) be subject to the Federal Estate Tax Act of 1918 (effective February 24th, 1919)?	8
CONCLUSION	36

TABLE OF CASES CITED.

	PAGE
Barclay & Co. *v.* Edwards, 267 U. S. 442	26
Barstow, Matter of, 230 App. Div. (N. Y.) 371	4
Billings *v.* U. S., 232 U. S. 261	24
Brady *v.* Ham, C. C. A. 1st Circuit, decided Nov. 26, 1930, not yet reported	34
Bromley *v.* McCaughn, 280 U. S. 124	25, 31
Bullen *v.* Wisconsin, 240 U. S. 625	29
Brushaber *v.* Union Pacific R. R. Co., 240 U. S. 1	5
Carroll *v.* Greenwich Insurance Co., 199 U. S. 401	26
Chambers *v.* Lamb, 186 Cal. 261, 199 Pac. 33	30
Chase National Bank *v.* U. S., 278 U. S. 327	12, 19, 32
Child Labor Tax Case, 259 U. S. 20	25, 26
Commissioner *v.* Northern Trust Co., 41 Fed. (2d) 732	33
Craig, Matter of, 97 App. Div. 289, Aff'd 181 N. Y. 551	4
Crooks *v.* Harrelson, et al., decided December 4, 1930, not yet reported	10
Eisner *v.* Macomber, 252 U. S. 189	24
Erskine *v.* White, 43 Fed. (2d) 765	34
Evans *v.* Gore, 253 U. S. 245	26, 27
Fairbank *v.* U. S., 181 U. S. 283	24, 26, 27
Farmers' Loan & Trust Co. *v.* Bowers, 29 Fed. (2d) 14	34
Flint *v.* Stone Tracy Co., 220 U. S. 107	7
Forbes Boat Line *v.* Board of Comm'rs, 258 U. S. 338	6
Frew *v.* Bowers, 12 Fed. (2d) 625	4, 6, 7, 14, 27, 28

PAGE

Hill *v.* Nichols, 18 Fed. (2d) 139 34
Hill *v.* Wallace, 259 U. S. 44 ..... 25, 26
Hilton *v.* Commissioner, 21 B. T. A. 3 34
Hodges, Matter of, 215 N. Y. 447, 449 30
Hodgkins *v.* Comm'r, 44 Fed. (2d) 43 33
Houston Estate, 276 Pa. St. 330 4

Knowlton *v.* Moore, 178 U. S. 41 ..... 17, 22, 27

Lansing, Matter of, 182 N. Y. 238 4

McCaughn *v.* Carnill, 43 Fed. (2d) 69 34
McCray *v.* U. S., 195 U. S. 27 25
May *v.* Heiner, 281 U. S. 238 ..... 21, 32, 33, 35
Morsman *v.* Comm'r., C. C. A. 8th Circuit, decided November 1930, not yet reported 34

Nichols *v.* Bradley, 13 Fed. (2d) 857, aff'd. C. C. A. 27 Fed. (2d) 47 24
Nichols *v.* Coolidge, 274 U. S. 531 ..... 4, 6, 7, 14, 18, 22, 27, 35, 36
Nicol *v.* Ames, 173 U. S. 509 ..... 7, 24

Page *v.* Skinner, 298 Fed. 731 cert. denied 266 U. S. 625 6
Patton *v.* Brady, 184 U. S. 608 ..... 5, 25
Pell, Matter of, 171 N. Y. 48 4
Pollock *v.* Farmers' Loan & Trust Co., 158 U. S. 601 ..... 24, 26

Reinecke *v.* Northern Trust Co., 278 U. S. 339 ..... 5, 10, 20, 21, 32

Saltonstall *v.* Saltonstall, 276 U. S. 260 5
Schlesinger *v.* Wisconsin, 270 U. S. 230 ..... 23, 27, 29, 36
Schmidlapp, Matter of, 236 N. Y. 278 5

PAGE

Schwab *v.* Doyle, 258 U. S. 529 6
State Tax Commission *v.* Robinson's Ex'c'r (Ky.) 28 S. W. (2d) 491 23
Stockdale *v.* Insurance Companies, 20 Wall. 323... 5

Thomas *v.* U. S., 192 U. S. 363 ..... 7, 24
Trusler *v.* Crooks, 269 U. S. 475 ..... 25, 26
Tyler *v.* U. S., 281 U. S. 497 ..... 13, 21, 22

Ullman *v.* Commissioner, 20 B. T. A. 782 34
Untermyer *v.* Anderson, 276 U. S. 440..... 4, 6, 7, 8, 27, 36

Webber, Matter of, 151 App. Div. (N. Y.) 539.... 30
Wheeler *v.* Commissioner, 20 B. T. A. 695 34

TABLE OF REGULATIONS AND TREASURY DECISIONS CITED

Reg. 37, Art. 23 9
Reg. 70, Art. 27 34
T. D. 4296, I. R. B. IX-32-4744 (p. 3) 34

Supreme Court of the United States,

OCTOBER TERM—1930.

No. 87.

SETH M. MILLIKEN, GERRISH H. MILLIKEN, and HAROLD A. HATCH, Executors of the Estate of Seth M. Milliken, Deceased,

Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

MAY IT PLEASE THE COURT:—

The undersigned, as counsel for the City Bank Farmers Trust Company, as executor and as Trustee, and as counsel for others, respectfully move this Honourable Court for leave to file the accompanying brief in this case as *amici curiae.*

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
as *Amici Curiae,*
Counsel for City Bank Farmers Trust Company, and for others.

Supreme Court of the United States,

OCTOBER TERM—1930.

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Petitioners,

against

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF AMICI CURIAE.

This brief, by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of the City Bank Farmers Trust Company, of New York, as Executor and Trustee of estates, and on behalf of other estates, for which the undersigned are counsel, wherein the Commissioner of Internal Revenue has determined inter vivos transfers of the decedent to have been made in contemplation of death.

Facts.

The facts are admitted and are relatively simple. They are fully set out in the Record on Appeal and in the brief of counsel for the petitioners. In brief they are as follows:—

Seth M. Milliken died on March 5th, 1920, leaving a large estate. In December of 1916 he transferred by way of gift 2713 shares of stock of Minot Mills (Inc.) to his two sons and daughter. The petitioners have waived any right to say that such gifts did not constitute transfers in contemplation of death.

Brief Resume of Facts in Two of the Cases Represented by the Undersigned.

In one of these cases the property transferred was transferred during the period of the operation of the Act under which the decedent died, and the value of the property transferred was substantially the value thereof as of the date of death, and also the donee was possessed of relatively the same property that was transferred by the donor. But in this case there were not sufficient assets in the estate of the decedent to pay the tax assessed by reason of the irrevocable *inter vivos* gifts.

In the other case the facts briefly are the following: In February and March, 1924, a donor transferred by way of gift property having a value of approximately $389,000.00 to her daughter. The donor died in November of 1927. In November, 1927, the specific securities transferred in 1924 had a value as determined by the Commissioner of Internal Revenue of approximately $505,000.00. Some of the securities transferred by the donor in 1924 had been disposed of by the donee prior to the death of the donor in November, 1927. Never-

theless the Commissioner of Internal Revenue taxed the value of the securities transferred at the value thereof at the date of the death of the donor.

The Issues.

This brief will deal only with the constitutionality of the provisions of the Federal Estate Tax Act in so far as they attempt to impose a tax upon gifts irrevocably made, even though made in contemplation of death. The constitutionality of the law will be approached from the consideration of two major propositions: (1) May a transfer made during the pendency of one tax law with stated graduated rates of tax be taxed as an excise under a subsequently enacted tax law at greatly increased graduated rates of tax?; and (2) may an irrevocable *inter vivos* transfer, even though in contemplation of death, be subject to the Federal estate tax as a part of the estate of the decedent, and the tax rate applied upon the value of the property transferred at the value thereof upon the date of the death of the donor, and in addition thereto, the graduated tax rate applied to the value of such property added to the value of property composing a part of the estate of the decedent?

POINT I.

May a transfer made during the pendency of the tax law with stated graduated rates of tax be subject to an excise tax under a subsequently enacted law at greatly increased graduated rates of tax?

Counsel for the petitioners have quite adequately discussed the issue of whether the statute (Revenue Act of September 8, 1916) existing at the time of the gift was repealed by the Revenue Act of 1918 (in existence at

the time the donor died), under which latter act the tax was asserted and collected. We therefore shall confine the argument presented herein to the issue of whether under the Federal Constitution (Art. 1, Sec. 2, Cl. 3, Sec. 9, Cl. 4, and the Fifth Amendment) the rate or amount of the excise may be increased after the full completion of the occasion giving rise to the tax.

If a transfer even though intended to take effect in possession or enjoyment at or after death may not be subjected to tax under a statute enacted after the transfer (*Nichols* v. *Coolidge*, 274 U. S. 531; *Frew* v. *Bowers*, 12 Fed. [2d] 625, C. C. A. 2nd), and a gift made during the pendency in Congress of a law imposing a tax upon such gifts constitutionally may not be amenable to such tax when the law is enacted (*Untermyer* v. *Anderson*, 276 U. S. 440), it should follow necessarily that a transfer already complete may not be subjected to an increased rate of tax under a subsequently enacted law.

The New York courts have held that an irrevocable transfer is immune from encroachment by subsequent legislation (*Matter of Pell*, 171 N. Y. 48; *Matter of Craig*, 97 App. Div. 289, affd. 181 N. Y. 551; *Matter of Lansing*, 182 N. Y. 238; *Matter of Barstow*, 230 App. Div. 371, October, 1930).

In the *Barstow* case the transfer in trust was subject to tax as a transfer intended to take effect in possession or enjoyment at or after death under the law existing in 1923 in which year the transfer was made, but before the death of the transferror in 1926 the law was amended so as to impose a greater tax burden, and the Court held the transfer subject to tax only at the rates and under the law obtaining at the time of the transfer by the indenture of trust.

In Pennsylvania (*Houston Estate*, 276 Pa. St. 330) it has been held that an increase in the death duty rate from five per centum to ten per centum after a transfer

intended to take effect in possession or enjoyment at or after death has been made but before the death of the transferror, is invalid, and that the transfer is taxable only at the rate in existence at the time it is made. (See also *Matter of Schmidlapp*, 236 N. Y. 278.)

When the gift or transfer is complete and fully vested, and the transfer "has passed beyond dependence upon the continuance of the state's permission or grant" cases such as *Saltonstall* v. *Saltonstall*, 276 U. S. 260, *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (as to two trusts), *Patton* v. *Brady*, 184 U. S. 608, and *Stockdale* v. *Insurance Companies*, 20 Wall. 323, have no pertinent application.

Here we are dealing with an excise upon a single act already complete at the time of the enactment of the law under which it is sought to be taxed. We are not dealing with an incomplete transfer such as existed in the *Saltonstall* and *Northern Trust Company* cases, nor with an increased excise tax during the period of the excisable occasion, as in the *Patton* case, nor with limited retroactive legislation in respect of a direct or property tax (income tax), as in the *Stockdale* case or in *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1, but with a transfer of property irrevocably and completely made and fully vested prior to the enactment of the law under which the tax was sought to be imposed. We are dealing with a law that has placed an additional burden upon a transaction differently burdened, if at all, at the time it took place.

At the time of the gift, assuming the gift was subject to the tax, the law imposed a tax at the maximum rate of ten per centum. At the time of the death of the donor more than three years afterwards, the law then in existence imposed a tax upon the same transfer at a maximum rate of twenty-five per centum, and the graduated rate is made applicable not only to the value of the property transferred but the value thereof added to the value

of the property belonging to the donor at death. In the language of Judge Learned Hand in *Frew* v. *Bowers* (12 Fed. [2d] 625, 630) "Such a law is far more capricious than merely retroactive taxes".

Such a law, or such an application of the law, is as deserving of the condemnation of the Court, as capricious and unreasonable, as was the gift tax in *Untermyer* v. *Anderson*, supra, or the estate tax in *Shwab* v. *Doyle*, 258 U. S. 529, and *Nichols* v. *Coolidge*, 274 U. S. 531. The tax in suit is upon a gift. True, it is called a tax upon a gift in contemplation of death. But the gift is none the less a gift, and none the less irrevocable. The property given is not a part of the estate of the decedent at the time he died. The property is not transferred by virtue of death nor at death. That is, death does not mark the time of the transfer, nor is a gift so made testamentary in any sense of the word. The property transferred had belonged to others for a period of more than three years prior to the death of the donor, and may have been transmuted into other property of a greater or lesser or of no value at the time of the death of the grantor.

"The rate of taxation is an indispensable element in the assessment, as much so as the value on which it is to be laid. Without either no assessment can be made." (*Page* v. *Skinner*, 298 Fed. 731, at p. 735, certiorari denied 266 U. S. 625).

If the transfer be wholly free of tax at the time thereof the decisions of this Court are clear that it remains immune from subsequent legislative attack. (*Nichols* v. *Coolidge*, supra, *Untermyer* v. *Anderson*, supra; cf. *Forbes Boat Line* v. *Board of Commissioners*, 258 U. S. 338).

An increase in the rate of tax upon a transaction already complete at the time of the increase (even though the increase be by amendment of the law rather than by a new enactment) is no less capricious and whimsical. A transfer complete at the time of the adoption of a law

imposing a tax upon such transactions for the first time can be no greater a violation of the Fifth Amendment of the Constitution of the United States than a subsequent increase of the tax burden. The amount of the burden is as unforeseen in one instance as in the other. (Cf. *Nichols* v. *Coolidge*, supra; *Untermyer* v. *Anderson*, supra; *Frew* v. *Bowers*, supra). But as this is a death duty subjecting to tax the transfer only when death occurs the transfer may not be taxed at the old rates because they no longer exist as a part of the law, when the tax accrues.

If the deed be done, the act complete, the transfer irrevocable and the interest of the donees vested absolutely, at the time the tax burden is laid or increased, there would be no choice or election left whereby the tax could be escaped. It would be in effect nothing more nor less than an "absolute and unavoidable demand", and thus within the implications of the pronouncements of this Court an unapportioned direct tax in violation of Art. 1, Sec. 2, Cl. 3, and Sec. 9, Cl. 4 of the Constitution of the United States. (*Thomas* v. *United States*, 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151-152; *Nicol* v. *Ames*, 173 U. S. 509). Such a statute would single out certain past irrevocable gifts for taxation to the exclusion of other past irrevocable gifts.

As "taxes are very real things and statutes imposing them are estimated by practical results" (*Nichols* v. *Coolidge*, supra, at p. 541), the statute here must be construed in the light that it has imposed a burden of a possible twenty-five per centum tax upon a transfer that at the time it was made was subject, if at all, to a tax burden of only a possible maximum of ten per centum. The practical result of the statute as applied herein is the imposition of a retrospective excise.

> " 'Retroactive laws are, indeed, generally unjust; and, as has been forcefully said, neither accord with sound legislation nor with the fundamental principles of the social compact.'

> There is absolute prohibition against them when their purpose is punitive; they then being denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated."

A tax burden retroactively laid upon a completed transaction violates the Federal Constitution. (*Untermyer* v. *Anderson*, 276 U. S. 440). This is true fundamentally whether the excise be by statute for the first time enacted, or by an attempted retrospective increase of the tax burden.

POINT II.

May an irrevocable transfer made in contemplation of death (whether made before or after the passage of the act) be subject to the Federal Estate Tax Act of 1918 (effective February 24th, 1919)?

This inquiry properly may be considered from two standpoints:—

1. A consideration of the Act itself, and the bases of the tax as well as its method of computation;
2. A consideration of the tax as imposed by and applied under said Act with reference to whether it violates the Fifth Amendment of the Constitution.

In this order the constitutionality of the statute in suit as applied will be considered. Any discussion of the unconstitutionality of the law as drawn in its application

to transfers made in contemplation of death, must necessarily be upon the hypothesis that the transfers made in contemplation of death subjected to tax by the statute are not limited to gifts *causa mortis*. (See Art. 23, Regulations 37, promulgated under Rev. Act of 1918). Of course, if the statute applies only to gifts *causa mortis* there could be no issue as to the constitutionality of the application of the law in the point now discussed, for gifts *causa mortis* have always been treated as the equivalent of legacies and as being definitely testamentary in character. Gifts *causa mortis* were considered testamentary as far back as the old Roman law (1). The term "gifts *causa mortis*" was codified in the provisions covering the law of gifts in the "Civil Code of the State of New York" (prepared for adoption in 1865 by David Dudley Field and Alexander W. Bradford but never adopted) and familiarly known as the "Field Code" (2). These provisions, however, have been copied in the Civil Code of California and some other states.

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(1) For the antiquity of gifts *causa mortis* see Institutes of Justinian (Abdy & Walker Edition 1876 at p. 119 et seq. See also "Rome the Law-Giver" (by J. Declareuil, Professor at the University of Toulouse, translation by E. A. Parker), p. 372. "The gift in anticipation of death (*mortis causa*), whether oral or written; required under Justinian the presence of 5 witnesses, but no registration. It was revocable, *ad nutum*, unless the donor had renounced it," etc.

Even at the time of Augustus there was a testamentary succession tax (*vicesima hereditatum*) on the manumission of slaves (Gibbon's Decline and Fall of the Roman Empire, Ch. 6).

(2) The pertinent provisions of the Field Code in respect of gifts *causa mortis* are:

§503. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

§504. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

§505. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery from the illness, or escape from the peril under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time.

§506. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

§507. A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver."

If the statute applies only to gifts *causa mortis* then the statute is not subject to constitutional objection upon the ground that the property is not transferred at death, nor upon the ground that the property transferred is taxed at its value as of the date of death, nor is it subject to attack upon the ground that property transferred *causa mortis* is not a part of the estate of the decedent which would be "subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate". (§402(a) Revenue Act of 1918; see also *Crooks* v. *Harrelson, et al.*, decided by this Court on December 4th, 1930).

But the statute as applied in the present case does more. It is treated as imposing a tax upon transfers not *causa mortis*, but irrevocably made if made in contemplation of death.

With the understanding, therefore, that we are addressing our argument to gifts not made *causa mortis*, but *inter vivos* and irrevocable, as the gifts in suit were, we shall consider the framework of the statute and its application.

1. A consideration of the Act itself, and the bases of the tax as well as its method of computation.

Section 401, Title IV of the Revenue Act of 1918 provides

> "That • • • a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States."

This is the only imposing section of the law. As this Court, through Mr. Justice Stone, said in *Reinecke* v. *Northern Trust Co., supra*, at p. 348:

"It is of significance, although not conclusive, that the only section imposing the tax, §401, does so on the net estate of decedents, and that the miscellaneous items of property required by §402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, *are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death.* They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment." (Italics ours.)

It will be noted that in all of the instances of Section 402 of the law, except that in respect of contemplation of death, a property right or interest is transferred at death and thus properly may be subjected to tax as a part of the estate of the decedent. At least up to the moment of death there are rights in property over which the decedent retained "control, possession or enjoyment."

Section 401 clearly does not impose a tax upon transfers made in contemplation of death. Section 402 therefore must be invoked in order to bring such transfers within the taxing ambit of the statute. Section 402 does not impose a tax. That section merely provides what property shall constitute the gross estate for the purposes of computing the tax. Section 402 reads in part as follows:—

"§402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real

or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as a part of his estate;

* * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of *this* Act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *"

Subdivision (c) attempts to bring within the gross estate the value of property "to the extent of any interest therein of which the decedent has at any time made a transfer * * * in contemplation of * * * death * * *." But the introductory clause of Section 402 does more. It provides that the gross estate shall be determined by including the "value at the time of his death". The statute therefore simply means that if a transfer has been made prior to death the property so transferred shall for the purposes of the tax be valued as of the date of death, and this regardless of the appreciation of the property from the time of the transfer to the date of death. It may be that subdivision (c) fairly is susceptible of the construction that the value to be used is the value as of the date of the transfer if the transfer be irrevocable. But this construction would be inconsistent with the introductory provision of Section 402, and contrary to the manner in which the law is administered (see *Chase National Bank* v. *United States*, 278 U. S. 327, p. 334). On the other hand, subdivisions (a), (b),

(d), (e) in part and (f) of Section 402 in unambiguous terms indicate that the interest in property transferred shall be valued as of the date of death. The language in (b) is specific "to the extent of any interest therein of the surviving spouse, *existing at the time of the decedent's death*, etc." Again, in (d) the language is "to the extent of the interest therein held jointly or as tenants in the entirety by the decedent * * *." If the property be held jointly or by the entirety at the moment of death naturally the values as of the date of death are the appropriate values. (*Tyler* v. *United States*, 281 U. S. 497). The language of subdivision (e) is "to the extent of any property passing under a general power of appointment * * *." In so far as such property would pass under the exercise of a general power of appointment by will, and as the tax is upon the right to exercise the power, the values as of the date of death naturally are the appropriate values. But where the power is exercised by deed "in contemplation of, or intended to take effect in possession or enjoyment at or after death * * *" the propriety of the provision taxing the value of the property so passing under the power as of the date of death instead of as of the date of the actual exercise of the power is as questionable as it is in subdivision (c). Subdivision (f) provides "to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent * * * and to the extent of the excess of $40,000 of the amount *receivable by all other beneficiaries*". Here, again, the value as of the date of death is the appropriate value.

The reasonable inference is that the statute read as a whole is susceptible only of the appropriate construction that the values as of the date of death are the values referred to in Section 402. So read, the statute is unreasonable and capricious when it applies to irrevocable

transfers made *inter vivos*. This is true whether the transfer be intended to take effect in possession or enjoyment at or after death, or be made in contemplation of death. In either case the statute imposes a tax in part upon property values never owned and never transferred by the trustor or donor. As Judge Learned Hand said in *Frew* v. *Bowers* (12 Fed. [2d] 625, at p. 630):—

> "There are settlements which the settlor outlives for 30 or 40 years. There is no limit to the increase in the value of land, for example, in such a period; it may easily be fiftyfold and the tax leave the settlor destitute when he dies. Conversely, another settlor may escape altogether. Such a tax is fixed by the mere sport of fortune. It has no more relation to the possessions or conduct of the taxpayer than if he were taxed upon the subsequent value of property he had sold outright, or his estate was doubled because he died on Wednesday. Such a law is far more capricious than merely retroactive taxes."

Or, as Judge Hough in the same case said at p. 628:—

> "But, if the technical construction is wrong, then we must face the question whether it is within the power of Congress to do what has been done; i. e., use the property of A. as a measure for the tax to be laid upon B. Thus stated, it would seem impossible to support the tax; attack must be on the form of statement. We have at great length examined the assemblage of phenomena that make up this case, in order to ascertain what they amount to; and we think the foregoing an accurate statement of what the tax at bar really is."

Mr. Justice McReynolds in *Nichols* v. *Coolidge*, 274 U. S. 531, at p. 542, said:—

> "Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing

for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers*, 12 Fed. [2d] 625."

The statute provides that the payment of the tax shall be made by the estate of the decedent. (Secs. 407-408 Rev. Act. 1918).

Section 409 imposes a lien to secure the tax upon the property transferred. It does more however. It imposes a personal liability upon the transferee of a transfer made in contemplation of death or the trustee of a transfer intended to take effect in possession or enjoyment at or after death. The pertinent portions of Section 409 are as follows:—

"If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, *and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall* be PERSONALLY LIABLE FOR SUCH TAX, and such property, to the extent of the decedent's interest therein at the time of such transfer * * * shall be subject to a like lien equal to the amount of such tax. * * * ". (Italics and capitals ours.)

It would follow that in the case of a transfer irrevocably made in contemplation of death, of real property having a value of $50,000 sold by the donee for the sum of $50,000, and subsequently to that sale and before the

death of the donor, so developed by the donee's vendee, either through the discovery of oil or mineral deposit, that at the time of death of the donor it had acquired a value of $1,500,000, and the donor had died leaving an estate of $5,000, the tax would amount to $101,500.00. Obviously the estate could not pay this tax. Then Section 409 would be invoked, and that section provides that if the tax in respect of the transfer in contemplation of death upon the property transferred "is not paid when due" the *transferee shall be personally liable* for such tax. He then would be required to pay a tax (after the assets of the estate of $5,000.00 had been exhausted) of $96,500.00 or $46,500.00 more than was ever transferred by the donor or ever received by the donee. Section 409 is not susceptible of interpretation that the personal liability of the donee is limited to the value of the property received by him, for the provision in respect of the lien is a provision of the law in addition to the personal liability of the transferee.

But may it be said that the decedent has ever transferred, or ever owned in order to transfer, property in excess of the value thereof at the time the transfer was made?

In the illustration given, if the donor had sold the property for $50,000.00, and made a gift of the proceeds of the sale in contemplation of death, the tax would be calculated only on $50,000.00. But if he give the property itself the tax is on $1,500,000.00 or $1,450,000.00 more property or property values than the donor ever transferred or owned. The statute therefore imposes a different tax burden dependent upon whether the gift be money or property. Yet the tax is computed only upon money values and translated only into dollar terms.

The undersigned are counsel in a case now pending in the Board of Tax Appeals wherein the decedent made during her life an absolute gift of securities in February

and March of 1924, of a value of $389,000.25. The donor died in November, 1927, leaving a small estate of $14,059.65. The value of the securities transferred in 1924 (some of which the donee had parted with before the death of the donor) had a value on November 22nd, 1927, as determined by the Commissioner of Internal Revenue, of $505,792.52.

The tax determined by the Commissioner upon the value at death of the specific securities given plus the value of the estate of the decedent (which was only $14,059.65) amounted to $13,221.15. If the value of the property transferred by the donor had been used in the computation of the tax together with the value of the estate the tax would have been only $8551.22. Under the whip of the statute a tax of $4669.93 has been imposed upon the transfer of property never owned by the donor and never transferred by her—and in this instance in part never owned or enjoyed by the donee.

The statute thus applied is patently whimsical and capricious beyond reason.

2. The tax as imposed by and applied under said Act violates the Fifth Amendment of the Constitution.

A progressive graduated excise upon a transfer—whether that transfer be by way of gift or by sale—may be measured only by the value of the thing transferred. As Mr. Justice White said in construing the inheritance tax act of 1898 in *Knowlton* v. *Moore* (178 U. S. 41), at p. 76:—

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on

> which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. *The gross inequalities which must inevitably result from the admission of this theory are readily illustrated.*" [Italics ours.]

In *Nichols* v. *Coolidge* (274 U. S. 531) this Court through Mr. Justice McReynolds points out the arbitrary character of a tax system that imposes a tax upon a transfer measured by anything other than the value of the thing transferred. At p. 542 he says:—

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. *Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died.* See *Frew* v. *Bowers*, 12 Fed. [2d] 625." (Italics ours.)

In *Chase National Bank* v. *United States* (278 U. S. 327) Mr. Justice Stone speaking for this Court said at p. 334:—

> "The statute in terms taxes transfers. Like provisions in earlier acts have been generally upheld as imposing a tax on the privilege of *transferring the property of a decedent at death, measured by the value of the interest transferred or which ceases at death.* Cf. *F. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349; *Nichols* v. *Coolidge*, 274 U. S. 531." (Italics ours.)

And again, at p. 336:—

> "But we think that the rule applied in *Saltonstall* v. *Saltonstall*, supra, to a succession tax is equally applicable to a transfer tax where, as here, the *power of disposition is reserved exclusively to the transferor for his own benefit.* Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee, *and we think that the termination of such a power at death may also be the appropriate subject of a tax upon transfers.*" [Italics ours.]

It is true that at pp. 338-339 the Court said in holding that the value of the insurance policies which were there subject to change or to being revoked for or to the benefit of the insured decedent, could be included as a part of the gross estate

> "The inclusion in the gross estate of gifts made in contemplation of death under Sec. 402(c) has a like effect".

But there was not before the Court in that case the question of whether an absolute and completed transfer of property prior to death could be taxed as a part of

the estate of the decedent under the form and in the manner provided by the statute in suit. Nor did that case have to do with a transfer of property that passed irrevocably "from the possession, enjoyment or control of the donor" prior to his death. This is indicated in the companion case decided the same day of *Reinecke* v. *Northern Trust Company* (278 U. S. 339). We repeat, in this case the Court said at p. 348:—

> "It is of significance, although not conclusive, that the only section imposing the tax, §401, does so on the net estate of decedents, and that the miscellaneous items of property required by §402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or *property passing out of the control, possession or enjoyment of the decedent at his death.* They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. *The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment.* In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402(c) 'to take effect in possession or enjoyment at or after his death', *include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401.* That doubt must be resolved in favor of the taxpayer." (Italics ours.)

Continuing, this Court said in *May* v. *Heiner*, (281 U. S. 238) at p. 244:—

> "The statute imposes 'an excise upon the transfer of an estate upon death of the owner'. *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61; *Nichols* v. *Coolidge*, 274 U. S. 531, 537."

The Court then quoted in part as pertinent to the issues presented in *May* v. *Heiner*, supra, the quotation above made from the *Reinecke* v. *Northern Trust Company* opinion.

In the case of *Tyler* v. *United States*, (281 U. S. 497) having to do with the taxability of estates held by the entirety, this Court through Mr. Justice Sutherland, at p. 503, said:—

> "The question here, then, is not whether there has been, in the strict sense of the word a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, *but whether the death has brought into being or ripened for the survivor*, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights."

It will be noted that through all of these cases and through all of the decisions of this Court, the basis of the tax is the transfer at death of a property right or interest over which the transferror up to the moment of his death had the beneficial "possession, enjoyment or control."

There must be at the moment of death a transfer of property the control of which transfer rested beneficially in the grantor. If there be no property transferred at death, there can be no tax.

> "The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate." *Knowlton* v. *Moore*, supra, at p. 59.

Again

> "Of course, they concern the passing of property by death, *for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed.*" (ib. p. 78.) (Italics ours.)

This thought is reflected in the opinion in *Nichols* v. *Coolidge*, supra, wherein the Court said at p. 542:—

> "If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died."

But this has to do not with "the power of taxation granted to Congress * * * but to an abuse of it." (*Tyler* v. *United States*, supra, at p. 504). True, "the power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." But we submit that the imperious and fundamental necessity of government does not on the other hand permit the Congress to impose a tax otherwise in violation of the Constitution, *upon the fiction* that property transferred in contemplation of death is in fact transferred at death, unless such a transfer be in truth at death as in the case of a *donatio causa mortis*.

A tax may not be called one in contemplation of death unless it is in fact in contemplation of death, and this regardless of the legislative intent and assumption that such a tax is necessary in order to prevent evasions

of the general scheme of death taxes. (See *Schlesinger v. Wisconsin*, 270 U. S. 230). In this case the Court said in respect of the Wisconsin statute which provided that all gifts made within six years of death should be presumed to have been made in contemplation of death, at p. 240:—

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasions of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the state more readily to collect lawful charges against 'B'. *Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity.* The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

See also *State Tax Commission v. Robinson's Excr.* (Ky.) 28 S. W. [2d] 491, in which a law making taxable all gifts made within three years as gifts made in contemplation of death was held unconstitutional.

It is of the essence of fiction to say that a gift, merely because made in contemplation of death, constitutes a transfer of property at death. If that need illustration it can be found in the case at bar, where the gift was made more than three years prior to the death of the grantor; or, in the case hereinbefore referred to which the undersigned represent where the gift was made more than three years and eight months prior to the death of the donor, and in which latter case the income and usufruct of the property so transferred, including possible capital gains upon the sale thereof, had by assessment against the donee paid its appropriate income tax into the United States Treasury. To say that Seth Milliken, the de-

cedent, transferred the property made the subject of this suit at his death, or transferred an interest therein susceptible of valuation as of the date of his death, "is to say something which is simply not true". (District Judge Morton in *Nichols* v. *Bradley*, 13 Fed. [2d] 857, at 859—affirmed by Circuit Court of Appeals, 27 Fed. [2d] 47.) In this case the District Judge said:—

> "To say that property which has been completely given away, and upon the disposition of which the donor's death has no effect, is still part of the donor's estate, is to say something which is simply not true."

The taxing power of Congress is plenary except in respect of exports, a tax upon which is specifically prohibited. So much may be admitted without in any way affecting or militating against the force of the challenge to the provisions of the statute in suit. The use of this plenary power, however, must be in accord with the provisions of the fundamental law (the Constitution), the ordaining of which gave birth at once to the power. If the Constitution in its grant of powers is to be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and its entirety. (*Fairbank* v. *United States*, 181 U. S. 283). Admittedly a tax may be imposed upon property or upon persons, but the tax must be apportioned. (*Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601; *Eisner* v. *Macomber*, 252 U. S. 189). Admittedly a tax may be imposed upon the sale of produce upon a board of trade or an exchange (*Nicol* v. *Ames*, 173 U. S. 509), upon the sale of shares of stock (*Thomas* v. *United States*, 192 U. S. 363, 370), upon the use of foreign built yachts (*Billings* v. *United States*, 232 U. S. 261), upon manufactured to-

bacco held for sale (*Patton* v. *Brady*, 184 U. S. 608), and upon the manufacture and sale of coloured oleomargarine (*McCray* v. *United States*, 195 U. S. 27). Admittedly, now, (*Bromley* v. *McCaughn*, 280 U. S. 124) a graduated excise may be imposed upon gifts.

But these taxes are all imposed not only within the admitted power of the Congress, but within the restrictions and regulatory provisions of the Constitution. It does not follow that a graduated excise may be imposed upon a sale of produce upon a board of trade, or upon shares of stocks, or upon gifts, the measure of the tax to be the value of the property at some uncertain date, one, three or ten years subsequently.

We venture to believe that if the gift tax upheld in *Bromley* v. *McCaughn*, supra, as a constitutional exercise of the taxing power within the limitations and prohibitions prescribed, had been imposed upon the value of all gifts made (whether of property or of money), the tax to be computed upon the value of the property three years from the date of the gift, for one donor, two years for another, four months for another, four days, and so on, or the value of the property even as of the last day of the year, that the statute would have been held arbitrary, unreasonable and capricious, and as such in violation of the Fifth Amendment.

The Congress may not any more than a State undertake to do indirectly what the Constitution forbids it doing directly, or do indirectly what it has no right to do directly. (*Child Labor Tax Case*, 259 U. S. 20; *Trusler* v. *Crooks*, 269 U. S. 475; *Hill* v. *Wallace*, 259 U. S. 44; *Fairbank* v. *United States*, 181 U. S. 283).

The Fifth Amendment stands guard against congressional usurpation or arbitrary and capricious exactions by the Federal Government as fully and effectively as the Fourteenth Amendment does in respect of exactions by

the States "without due process of law". In *Carroll* v. *Greenwich Ins. Co.* (199 U. S. 401) Mr. Justice Holmes states the converse of this now conceded principle of government at p. 410 as follows:

> "* * * if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth."

The Congress, under the guise of a tax may not undertake to regulate the employment of child labor (*Child Labor Tax Case*, 259 U. S. 20), or the grain exchanges (*Hill* v. *Wallace*, supra, *Trusler* v. *Crooks*, supra).

> "The power to tax carries with it 'the power to embarrass and destroy'; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forbear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed." (*Evans* v. *Gore*, 253 U. S. 245 at p. 256—and see cases there cited).

But said this Court through Mr. Chief Justice Taft in *Barclay & Co.* v. *Edwards* (267 U. S. 442, at p. 450 [in quoting the above]):—

> "The power of Congress in levying taxes is very wide, and where a classification is made of taxpayers that is *reasonable, and not merely arbitrary and capricious, the Fifth Amendment cannot apply.*"

The rule then is not so stark as the statement of the plenary powers of Congress to tax would imply. The power exists,—but it must be exercised in the manner and form provided for in the Constitution. (*Pollock* v. *Farm-*

ers' Loan & Trust Co., supra). This is necessary to the preservation of government itself. If the government may act outside of constitutional limitations, the citizen will demand the same freedom from lawful restraint. If the power be not there as in a tax upon exports, they may not be taxed indirectly (*Fairbank* v. *United States*, supra), nor the emoluments of constitutional officers be diminished indirectly by subjecting the compensation to income taxes. (*Evans* v. *Gore*, supra). Even when the power to tax exists it may not be arbitrarily and capriciously exercised. (*Nichols* v. *Coolidge*, supra; *Untermyer* v. *Anderson*, supra; *Frew* v. *Bowers*, 12 Fed. [2d] 625, C. C. A. 2nd). The courts were ordained under our constitutional system to protect the citizen from arbitrary and unreasonable action by the Congress as well as "to preserve the integrity of the powers of the Government". (Wilson's Constitutional Government in the United States, pp. 17, 142—quoted in *Evans* v. *Gore*, supra, at pp. 2521-2522).

While the courts may be loath to declare unconstitutional acts of Congress (*Knowlton* v. *Moore*, 178 U. S. 41), they are no less loath to validate arbitrary and capricious exactions from the citizens merely because called "taxes", and merely because done in the name of "revenue". "Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity". (*Schlesinger* v. *Wisconsin*, supra, at p. 240).

The tax on the transfer of the estate of the decedent herein is measured by the value of property given away more than three years before his death, and the tax is computed on the value that this property so given had three years after the donor had ceased to own it. The tax is so imposed whether or no the donee still possessed the property; the tax is so imposed regardless of the value of the property left by the decedent at his death,

and transferred by his death. The statute takes no account of the value of the thing transferred, or the value of the interests of the donor transferred, and counts not the tax cost to the estate of the decedent upon property values never owned by the decedent. It ignores the fluctuations in the values of securities, or the possible enormous increase in the value of real estate. The tax burdens attach regardless of who suffers and regardless of whether the values taxed ever belonged to the donor or donee. The tax follows not the values transferred but the property, and finding that in whosesoever hands revenue is exacted upon the value thereof as of the time of death of the donor from the donor's estate or the donee.

A tax so imposed, so computed, is determined truly by "the sport of fortune". It may just as well, as Judge Learned Hand said in *Frew* v. *Bowers,* supra, be fixed by the price of wheat or doubled because the decedent died on Wednesday.

But it is argued all who make irrevocable transfers in contemplation of death run the same risks and are taxed the same way. But this is an indictment of the statute, not a defense of it. The fact would remain that the statute would arbitrarily and capriciously discriminate between a donor making an irrevocable transfer *inter vivos* in contemplation of death, and a donor making an irrevocable transfer *inter vivos* not in contemplation of death, taxing the one and not the other.

Moreover, because the estate of every man who dies may with the favourable or unfavourable fortuities of chance be taxed differently, depending upon the date he dies, and the subsequent economic appreciation or depreciation of the article transferred many years prior to death, does not render the tax any the less capricious. If anything the thoroughgoing nature of the statute makes the act all the more blameworthy.

But the argument runs that estate taxes could and would be avoided, and that the provisions of Section 402 (c) must be sustained as a valid imposition even though if standing alone of doubtful constitutionality they be a part of the general scheme of taxation deemed necessary to prevent tax avoidance. We respectfully submit that a tax imposed upon "A" which would be otherwise unconstitutional cannot be made constitutional because of the danger that "B" might avoid a similar tax. (*Schlesinger* v. *Wisconsin,* supra, at p. 240). We think this Court should be slow to place its stamp of approval upon a method of taxation that is in its operation and application patently capricious and unjust.

If a given transfer fall within the statute it is unnecessary to establish an intent to "evade" the tax in order to make it taxable; if it does not, an intent to "evade" is immaterial. (See *Bullen* v. *Wisconsin,* 240 U. S. 625, at p. 630). In this case Mr. Justice Holmes expressed the thought as follows:—

> "* * * when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

The desire to prevent evasion of death duties may permit the legislature to tax certain transfers, but when the legislative policy is effectuated by a statute which describes the transfers to be taxed, the "evasion" question is superseded by the statute designed to prevent evasion, and the only matter to be determined is whether or not a particular transfer was made under circumstances which bring it within the class made taxable by the statute.

It is possible, of course, that proof of an intent to "evade" may bear upon the issue as to whether or not a transfer has been made under taxable circumstances, but the presence or absence of such an intent is not the standard by which taxability or nontaxability is to be determined.

The provision of the statute taxing gifts in contemplation of death was borrowed from the state statutes and presumably from the New York statute, as New York was the first of the states to impose a tax upon gifts made in contemplation of death. But the scheme of the New York tax and of the other state taxes is different from that of the Federal tax. Under the state law the tax is upon the transfer as of the date of the transfer and the property so transferred in contemplation of death is taxed separately from the property passing at death, because property irrevocably transferred, though in contemplation of death, is not transferred at death and is not a part of the estate of the decedent (*Matter of Hodges*, 215 N. Y. 447, 449; *Matter of Webbe*, 151 App. Div. [N. Y.] 539, 541). This is likewise the rule in California, which was the second of the states to impose a tax upon transfers in contemplation of death. (*Chambers* v. *Lamb*, 186 Cal. 261, 264, 265).

The Federal Estate Tax Act does not permit the irrevocable transfer made *inter vivos* to be taxed separately from the property constituting the estate of the decedent and passing at his death. Nor does the statute permit of a valuation of the property as of the date of the transfer. The Federal statute with reference to gifts made in contemplation of death has undertaken to set up a basis for taxing *inter vivos* transfers incompatible with justice, and with necessarily capricious and unreasonable results. Section 401 imposes a tax on the net estate of the decedent. Section 402 defines the gross estate and the basis of arriving at the value thereof for

the purposes of computing the tax. It provides that the tax shall be computed on the value as of the date of death of those items which it undertakes to cast into the gross estate. The Federal statute in addition imposes a graduated rate of tax on the total.

It may not be urged that this Court in sustaining the constitutionality of the gift tax under the Revenue Act of 1924 in *Bromley* v. *McCaughn* and upholding the propriety of computing the tax on the value of all the transfers made by the donor during the year is authority for upholding the tax here involved. That was an annual tax, based upon the value of gifts made during the period of the taxable year. Also in the gift tax the liability was all upon the donor. The adding together of the gifts was for the purpose of measuring the annual tax. It warned the taxpayer that if gifts over $50,000 were made in any particular calendar year the donor was liable for a graduated tax computed upon the value of the gifts as of the time made. The donor at the time of each gift could calculate his tax liability, and would know his tax burden. Here, no annual tax is imposed, no definite period is fixed for the accumulation of the value of the gifts for the purposes of the computation of the tax, and gifts made one, three, five or twenty years before death are all combined with the value of the property left at death for the purpose of calculating the tax, if the gifts be made in contemplation of death. Also the values of the gifts are ignored, and the property is given a value as of the date of the subsequent death of the transferror for the purposes of reckoning the excise. The gift and the values taxed have no relation to each other.

In the statute in suit a liability is placed upon the transferror or his estate for the payment of a tax upon the value of property never transferred by him, and in many instances never received by the transferee, and if his estate be unable to pay the tax the transferee or

donee regardless of what he has received is made by virtue of Section 409 personally liable for a tax, not upon what was given to him, but upon property that has enhanced in value in his hands, or as not infrequently occurs, in the hands of his vendee or alienee.

The inability to apply the statute constitutionally to a tax upon gifts in contemplation of death or any other irrevocable *inter vivos* transfers leaving in the grantor no property right or interest is inherent in the statute itself. The state statutes in imposing a tax upon transfers in contemplation of death tax the transfers. The impact of the tax does not wait upon death. The transfer of the property creates the obligation. The statute in suit is not susceptible of this construction.

Clearly a gift in contemplation of death is not testamentary. In fact the exact contrary is true. Irrevocability excludes the hypothesis that such a transfer is of a testamentary nature, that is, is in any way ambulatory. The two terms in fact, unless the gift be one *causa mortis*, are antithetical and repellant to each other.

We submit therefore that in order to harmonize the scheme of the Federal estate tax law as enacted by the Congress with the Constitution and with the other items constituting the gross estate as provided for in Sec. 402, transfers in contemplation of death may be included as a part of the gross estate only if they be transfers *causa mortis*, and those transfers within the doctrine and principle laid down by this Court in *Chase National Bank* v. *United States, supra, and Reinecke* v. *Northern Trust Company, supra,* and *May* v. *Heiner, supra.*

Other transfers defined in Section 402(c) are not taxable—if irrevocable from the time thereof.

This Court has held that an irrevocable transfer not in contemplation of death but with the reservation of the income is not one intended to take effect in possession or

enjoyment at or after death under Section 402(c) of the Revenue Act of 1918. The Court said in *May* v. *Heiner,* supra, at p. 243:

> "The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. *But this is not of special importance since the refund should have been allowed in either event.*
>
> "The transfer of October 1, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event."

True, the provisions of the trust instrument in *May* v. *Heiner, supra,* were that the property was to be held and the income payable to the husband of Mrs. May during his life and upon his death the income to be payable to her during her life and upon the death of the survivor the remainders over. But as this Court said it "is not of special importance" whether she survived her husband or not, and therefore received the income during her life. Since this decision the lower courts have construed *May* v. *Heiner, supra,* to hold, and pursuant to that construction have held, in several cases, that an irrevocable transfer is not one intended to take effect in possession or enjoyment at or after death within the purview of the Federal statute merely because the grantor has reserved the income during his life. See *Commissioner* v. *Northern Trust Company,* 41 Fed. [2d] 732, C. C. A. 7th Circuit; *Hodgkins* v. *Commissioner,* C. C. A. 7th, decided October 16th, 1930, 44 Fed. [2d] 43; *McCaughn* v. *Carnill,* 43 Fed. [2d] 69, C. C. A. 3rd;

Ullman v. *Commissioner*, 20 B. T. A. 782; *Wheeler* v. *Commissioner*, 20 B. T. A. 695; *Hilton* v. *Commissioner*, 21 B. T. A. 3. See contra *Morsman* v. *Commissioner*, 8th Circuit November 1930, Commerce Clearing House Vol. III, page 9228. Likewise under the Federal statute it has been held that an irrevocable transfer is not subject to tax notwithstanding the transferror reserved the right to change the beneficiary of the trust, excluding himself always as a beneficiary (*Brady* v. *Ham*, C. C. A. 1st, decided November 26, 1930, not yet reported); also a transfer subject to revocation with the consent of a trustee is not taxable if the transfer be otherwise wholly irrevocable. *Hill* v. *Nichols*, 18 Fed. [2d] 139; *Farmers Loan and Trust Company* v. *Bowers*, 29 Fed. [2d] 14, C. C. A. 2nd Cir.; *Erskine* v. *White*, 43 Fed. [2d] 765 (Mass: D. C.). Insurance policies irrevocably transferred are not subject to the tax (Reg. 70, Art. 27, as amended by T. D. 4296).

The state courts have held that transfers subject to the reservation of the income to the grantor are under the state death duty laws transfers intended to take effect in possession or enjoyment at or after death and therefore taxable. This Court has taken the contrary position in respect of the Federal estate tax, and necessarily under the provisions of Sections 401 and 402 of the law were compelled to take the converse position, because the Federal law is an estate tax imposed upon the transfer of an estate by the decedent at death. If the transfer be not at death, that is, there be no shifting of the economic benefits of the thing taxed under the law at or by virtue of death, the statute has no application to the transaction. The Federal statute takes no account of who receives the income because the value of a life estate is not one of the bases of the tax. The tax falls upon the value of the corpus or property transferred, and if that property be transferred not at death but prior thereto, the statute is inapplicable. This is as true nec-

essarily of gifts made in contemplation of death if irrevocable and complete, as it is of transfers in trust upon the reservation of the income therefrom to the grantor during life. In either case the transfer of the thing, the value of which is taxed, is complete, and nothing of taxable property interest passes at death. No control, possession or enjoyment of property given *inter vivos* in contemplation of death ceases or is transferred at or by death. Death is not the "generating source" of either of such gifts. The tax is upon the transfer.

That the tax is upon the transfer and not upon the taking effect in possession or enjoyment at or after death necessarily follows from the decision of this Court in *Nichols* v. *Coolidge, supra,* because the transfer did not take effect in the ultimate remaindermen therein until after the act went into effect. The same thing is true of the decision in *May* v. *Heiner, supra.* The thing upon which the tax rests is the transfer at death.

The bases of valuation negative the intention of Congress to tax anything else, and the capricious character of the tax, if it be applicable to any transfer of property other than such as those over which the decedent, up to the moment of his death, retained "control, possession and enjoyment", marks plainly the invalidity of the statute. A tax system that rests upon problematical and uncertain future or subsequent values of the things or transactions made amenable to the tax is too indefinite, too uncertain, too clearly a matter of chance, too whimsical and arbitrary, to stand the test of reasonableness. The Fifth Amendment is a guard against a tax upon "A", based upon the value of "B's" property; it will not countenance a stamp tax upon the sale of shares of stock the amount of the stamps to depend upon the value of the stock at some uncertain date one, two or twenty years in the future; it would be violated if the tax (tariff) rested upon the value of imports years subsequently to

the time of importation and regardless of whether the importer had disposed of, and the ultimate purchaser had consumed, the thing the import of which had been made subject to tax. That this is so is self-evident.

Is the statute as applied in the case in suit any less arbitrary or capricious; any less lacking in reasonable classification? Is the purpose to prevent evasion of the Federal death duty bound by no restrictions and the Congress free arbitrarily to single out for taxation certain gifts or transfers to the exclusion of others upon the ground that such transfers are reasonably related to other transfers, and capriciously fix the amount of the tax upon the chance value of the thing transferred at some uncertain and unascertained date in the future depending upon when the transferror died? "Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." (*Schlesinger* v. *Wisconsin,* supra, p. 240.)

The Fourteenth Amendment is no greater prohibition against the right of a state to deny due process of law than is the Fifth Amendment against the right of the Federal Government to deny due process of law, or to exact arbitrarily the property of its citizens even at the imperious call of the need of revenue.

Conclusion.

We suggest that the tax as imposed in the case in suit is a violation of the Constitution of the United States, in that it constitutes a retroactive excise upon a completed transfer, and thus is in violation of the Fifth Amendment within the decisions of this Court in *Untermyer* v. *Anderson,* supra, and *Nichols* v. *Coolidge,* supra. So retro-

actively applied it is, looking at the substance and not the mere form, an unapportioned direct tax and as such in violation of Article 1, Section 2, Clause 3, and Section 9, Clause 4 of the Constitution.

Even prospectively applied, we submit, the statute as drawn and as applied to irrevocable completed transfers before death is necessarily arbitrary and capricious, and as such is an abuse of the taxing power conferred upon Congress. The exactions under the statute are unjust to the citizen. The statute willfully and designedly imposes a tax upon property values never transferred and frequently never owned by the transferee. It whimsically places tax burdens upon estates because of some prior act of the decedent, and measures the tax by no definite or known standard, and even more capriciously exacts from a transferee a tax in excess of the value of any property at any time transferred by the donor or received by the donee, all in violation of the Fifth Amendment of the Constitution.

POINT III.

The judgment of the Court of Claims should be reversed.

Respectfully submitted,

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae.